80-784

Supreme Court, U.S.
FILED
NOV 7 1980
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

NO. _____

STATE OF WASHINGTON, PETITIONER

V.

JAMES JOSEPH DAUGHERTY, RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE WASHINGTON STATE SUPREME COURT

C. DANNY CLEM
Prosecuting Attorney
RONALD A. FRANZ
Deputy Prosecuting Attorney
Attorney for Petitioner

Kitsap County Courthouse
614 Division Street
Port Orchard, WA 98366
Telephone: (206) 876-7174

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

NO. _____

STATE OF WASHINGTON, PETITIONER

V.

JAMES JOSEPH DAUGHERTY, RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE WASHINGTON STATE SUPREME COURT

C. DANNY CLEM
Prosecuting Attorney
RONALD A. FRANZ
Deputy Prosecuting Attorney
Attorney for Petitioner

Kitsap County Courthouse
614 Division Street
Port Orchard, WA 98366
Telephone: (206) 876-7174

Questions Presented For Review

A. To enhance the safety of police officers by blocking a potential escape route and to look for accomplices, does the Fourth Amendment proscribe one of several police officers from engaging in a flanking action in the suspect's driveway when the suspect is standing in his driveway and where he is a known felon and suspect in a fresh safe burglary?

B. Assuming that a police officer investigating a safe burglary is justified in being in a position from which he observes a safe in the suspect's garage, is the officer then justified by the "plain view" doctrine in entering the garage, making further indentification of the safe and ultimately seizing it, all without a warrant?

C. Assuming that evidence is seized without a warrant and in violation of the Fourth Amendment, should such evidence be suppressed at trial?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW..... i

TABLE OF CONTENTS..... ii

TABLE OF AUTHORITIES.....iii

Table of Cases.....iii
Other Authority..... iv

OPINIONS BELOW..... 1

JURISDICTIONAL STATEMENT..... 1

CONSTITUTIONAL PROVISIONS INVOLVED.... 1

STATEMENT OF THE CASE..... 2

ARGUMENT..... 8

A. The Fourth Amendment does not proscribe the police officer's flanking action.... 8

B. The safe was properly seized under the "plain view" doctrine..... 13

C. The exclusionary rule should be abandoned..... 17

CONCLUSION..... 18

TABLE OF AUTHORITIES

Table of Cases

Page

Adams v. Williams, 407 U.S. 143, 42 S.Ct. 1921, 32 L.Ed.2d 612 (1972)..... 10

Brown v. Texas, 443 U.S. 47, 99 S.Ct. 2637, ___ L.Ed.2d ___ (1979)..... 11

California v. Minjares, ___ U.S. ___, 100 S.Ct. 9, ___ L.Ed.2d ___ (1979)..... 17

Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971).....14,15

Delaware v. Prouse, 440 U.S. 648, 99 S.Ct. 1391, ___ L.Ed.2d ___ (1979)..... 12

Dunaway v. New York, 442 U.S. 200, 99 S.Ct. 2248, ___ L.Ed.2d ___ (1979).....11,12

Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961)..... 17

State v. Campbell, 13 Wn. App. 722, 537 P.2d 1067 (1975)..... 16

State v. Coburne, 10 Wn. App. 298, 518 P.2d 747 (1973)..... 17

State v. Daugherty, 94 Wn.2d 263, ___ P.2d ___ (1980).....1,13,16

State v. Day, 7 Wn. App. 965, 503 P.2d 1098 (1972)..... 16

State v. Dimmer, 7 Wn. App. 31, 497 P.2d 613 (1972)..... 17

State v. Glasper, 84 Wn.2d 17, 528 P.2d 937 (1974)..... 16

State v. Lesnick, 84 Wn.2d 940, 530 P.2d 243 (1975)..... 16

State v. Murray, 8 Wn. App. 944, 509 P.2d 1003 (1973)..... 16

State v. Palmer, 5 Wn. App. 405, 487 P.2d 627 (1971)..... 17

State v. Porter, 5 Wn. App. 460, 488 P.2d 773 (1971)..... 17

State v. Sinclair, 11 Wn. App. 523, 523 P.2d 1209 (1974)..... 17

Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)..... 9

Other Authority

RCW 9A.52.030..... 2

RCW 9A.56.020..... 2

28 USC §1257(3)..... 1

Opinions Below

The opinion of which Petitioner seeks review is State v. Daugherty, 94 Wn.2d 263, ____ P.2d ____ (1980). A copy of this opinion is appended and is denoted Appendix A. The opinion of the intermediate appellate court is State v. Daugherty, 22 Wn.App. 442, 591 P.2d 801 (1979). A copy of this opinion is appended and is denoted Appendix B.

Jurisdictional Statement

The judgment of the Washington Supreme Court was entered on September 11, 1980 and this Petition For Writ of Certiorari was filed within sixty days of September 11, 1980. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §§ 1257(3).

Constitutional Provisions Involved

U.S. Const. Amend. IV provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures,

> shall not be violated; and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or things to be seized.

Statement of The Case

On May 13, 1977 Respondent was charged with second degree burglary under RCW 9A.52.030 and second degree theft under RCW 9A.56.020 in the Kitsap County Superior Court. These charges were the result of a burglary and theft which occurred on May 12, 1977. Stolen were a safe and its contents.

Prior to trial the Respondent, by written motion, moved to suppress the admission into evidence of the safe and contents which had been recovered alleging, inter alia, that they were seized in violation of the Fourth Amendment. The transcript of the pretrial motion to suppress shows the following.

On May 12, 1977 Henry Patterson of the Poulsbo Police Department assisted in the investigation of a burglary to the Dungeness Oyster Company which had occurred during the morning of May 12, 1977. The officer learned that a black safe had been stolen. Although the weight of the safe was unknown, Officer Patterson believed it would take two people to move it around.

During the burglary investigation, Officer Patterson learned that Officer Cook had contacted the Respondent at 4:30 a.m. on May 12 in the vicinity of the oyster company. Cook told Patterson he had seen the Respondent's vehicle in three locations and at one point it was backed up to the building occupied by the oyster company. Cook also told Patterson that he had then contacted the Respondent and the the Respondent told Cook that he worked at the oyster company,

that he had been drinking, and was going to the apartment of a friend who lived nearby.

There were two reasons to contact the Respondent forthwith: (1) he had been in the area of the burglary and possibly had investigative leads; and (2) his suspicious actions in the area made him a suspect. Therefore, at 10:15 a.m. on May 12, 1977 four Poulsbo police officers contacted the Respondent at his residence. Prior to contacting him, the officers knew that he had been in prison for burglary and bad checks.

When the officers arrived at the Respondent's residence, they observed him at the rear of his pickup truck. The pickup truck was on the left-hand side of the driveway and was backed up to the garage door. The garage door was open. To the right of the driveway was a large, old army truck. The officers

quickly exited their vehicle. While Officer Patterson confronted the Respondent in the driveway, Officer Krebs engaged in a flanking action by going to the right of the army truck. Officer Krebs, although new to the Poulsbo Police Department, was an experienced police officer. Krebs took this action to prevent a possible escape and to look for additional suspects. When Krebs got to the rear of the army truck, he observed in plain view what appeared to be a safe on the ground near the back of the pickup truck. Krebs then directed Patterson to arrest the Respondent. Perhaps the best explanation for the flanking action is provided by Officer Krebs who testified:

> Question: Why was it that you flanked off to the right?
>
> Answer: There was a possibility of the suspect fleeing upon seeing the police vehicle and officers arriving, and there was also the possibility

of the officers' safety with the fact that this was a possible felon that we were going after at the time, a felony had been committed and he could have been armed; and, also, there was the possibility that he had an accomplice due to the fact that the safe, from the description that we received, was heavy.

Question: Uh-huh; was this standard police procedure?

Answer: Yes, it is.

The officers seized the safe without a search warrant. The trial court denied the motion to suppress. At Respondent's jury trial various individuals testified concerning the safe and its contents.

The Respondent was found guilty of both charges. After judgment and sentence were pronounced on July 14, 1977, he appealed to the court of appeals. In the court of appeals he assigned error to the trial court's failure to grant his motion to suppress. The court of appeals agreed with Respondent, reversed

the trial court, and in so doing stated at 22 Wn.App. 445-46:

> . . . Officer Krebs' observation of the safe was not a "search" within the meaning of the Fourth Amendment; it was not truly a "plain view" observation. * * *
>
> * * *
>
> . . . [T]he safe which was seized in violation of the constitution must be suppressed. . . .

Petitioner sought review of the court of appeals' decision in the state supreme court. In its petition for review to the state high court, the issues presented were two: (1) did the "plain view" exception to the Fourth Amendment warrant requirement allow the seizure of the safe?; and (2) was the driveway to the residence a constitutionally-protected area for Fourth Amendment purposes?

The Washington Supreme Court granted review, affirmed the court of appeals by a five to four decision and in so doing stated at 94 Wn.2d 272:

> Since that state has failed to sustain its burden of showing the warrantless search fell within one of the exceptions to the warrant requirement of the Fourth Amendment, the search cannot be justified, and the motion to suppress the evidence should have been granted. The decision of the court of appeals is accordingly affirmed. [Citation omitted]

Argument

A. The Fourth Amendment does not proscribe the police officer's flanking action.

Petitioner submits that the Washington Supreme Court has decided this case in a way which is contrary to the decision of this Court. See Rule 17.1(c).

When the police officers contacted Respondent at his residence, they knew he was a convicted felon and had been observed behaving suspiciously near a building which had been burglarized not six hours before the contact. A safe had been stolen and the officers suspected that more than one person was involved.

The decisions of this Court permit the officers to quickly peruse the premises for a suspected accomplice and to block a potential escape route.

In Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968) the Court upheld the "stop and frisk" and subsequent seizure of weapons where the officer:

> . . . Had reasonable grounds to believe that petitioner was armed and dangerous, and it was necessary for the protection of himself and others to take swift measures to discover the true facts and neutralize the threat of harm if it materialized. . . . [H]e is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him.
>
> Id. 392 U.S. at 30.

The Court held that such a search was reasonable under the Fourth Amendment even though there was not probable cause to believe that a crime had or was occurring.

The Court again addressed the subject of intrusions into constitutionally-protected areas based upon less than probable cause in Adams v. Williams, 407 U.S. 143, 42 S.Ct. 1921, 32 L.Ed.2d 612 (1972). At 407 U.S. 146 the Court said:

> . . . A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time.
>
> . . . [T]he policeman making a reasonable investigatory stop should not be denied the opportunity to protect himself from attack by a hostile suspect. "When an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others," he may conduct a limited protective search for concealed weapons. The purpose of this limited search is not to discover evidence of crime, but to allow the officer to pursue his investigation without fear of violence, and thus the frisk for weapons might be equally necessary and reasonable, whether or not carrying a concealed weapon violated any applicable state law. * * * [Citations omitted]

There are, of course, limitations upon police conduct where there is less than probable cause. For example in Dunaway v. New York, 442 U.S. 200, 99 S.Ct. 2248, ____ L.Ed.2d ____ (1979) it was held that an individual could not be taken into custody and questioned without probable cause and in Brown v. Texas, 443 U.S. 47, 99 S.Ct. 2637, ____ L.Ed.2d ____ (1979) it was held that an individual could not be convicted for refusing to identify himself where there was no reasonable suspicion to justify stopping him in the first instance.

This Court has recognized that:

> . . . The essential purpose of the proscriptions in the Fourth Amendment is to impose a standard of "reasonableness" upon the exercise of discretion by government officials, including law enforcement agents, in order "'to safeguard the privacy and security of individuals against arbitrary invasions. . . .'" Thus, the permissibility of a particular law enforcement practice is judged by balancing its intrusion on the

> individual's Fourth Amendment interest against its promotion of legitimate governmental interest. [Citations omitted] [Footnotes omitted]

Delaware v. Prouse, 440 U.S. 648, 99 S.Ct 1391, ____ L.Ed.2d ____ (1979) at 99 S.Ct. 1396.

The Court addressed this balancing process again in Dunaway v. New York, supra where it said at 99 S.Ct. 2254-55:

> . . . And to determine the justification necessary to make this specially limited intrusion "reasonable" under the Fourth Amendment, the court balanced the limited violation of individual privacy involved against the opposing interest in crime prevention and detection and in the police officer's safety.

In the instant case the police officers contacted the Respondent with reasonable, articulable suspicions that he may have been involved in the burglary and theft and that he may have had an accomplice. While an intrusion of Respondent's person was not necessary to

allay the officer's fears, the flanking action around the old army truck was necessary. Such a limited intrusion onto Respondent's driveway is constitutionally permitted by the decisions of this Court.

B. The safe was properly seized under the "plain view" doctrine.

Assuming that the intrusion onto the Respondent's driveway to the position from which the safe was observed was constitutionally permitted, was its subsequent seizure without a warrant likewise justified? The Washington Supreme Court did not answer this question but stated:

> . . . Discovery of any evidence in the course of such a search is not "inadvertent" as is required for the plain view doctrine to apply. It follows that the inadvertence element of the exception was likewise absent in this search. [Citation omitted]

State v. Daugherty, supra, 94 Wn.2d at 272.

A grant of certiorari in this case would permit this Court to resolve a troublesome problem with respect to the "plain view" doctrine enunciated in Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971). The problem is that, assuming that there is justification for an intrusion and the inadvertent discovery of evidence, must there additionally be exigent circumstances to seize the evidence without a warrant? The source of this problem is probably Coolidge itself for it provides at 403 U.S. 468:

> The limits on the [plain view] doctrine are implicit in the statement of its rationale. The first of these is that plain view alone is never enough to justify the warrantless seizure of evidence.
> * * *

Petitioner believes that exigent circumstances need not exist to make a warrantless seizure of evidence once discovered under the "plain view" doctrine.

This belief comes from Coolidge which provides at 403 U.S. 467-68:

> . . .[The] initial intrustion is justified by a warrant or by an exception such as "hot pursuit" or search incident to a lawful arrest, or by an extraneous valid reason for the officer's presence. And, given the initial intrusion, the seizure of an object in plain view is consistent with the second objective, since it does not convert the search into a general or exploratory one. As against the minor peril to Fourth Amendment protections, there is a major gain in effective law enforcement. Where, once an otherwise lawful search is in progress, the police inadvertently come upon a piece of evidence, it would often be a needless inconvenience and sometimes dangerous -- to the evidence or to the police themselves -- to require them to ignore it until they have obtained a warrant particularly describing it. [Emphasis supplied]

Nonetheless the problem mentioned above is a very real one. In the case at bar it was outcome-determination for the intermediate appellate court. That court held:

> [The officer's] intrusion into a constitutionally protected area did not occur until he (and the other officers) entered the garage and

> seized the safe. More precisely described, the seizure followed a preintrusion "open view" observation, in contrast to a post-intrustion "plain view" observation. In absence of exigent circumstances, the officers could not seize that which was presented to them by the incontrovertible testimony of their senses, without first presenting that evidence of probable cause to a neutral and detached magistrate. * * * [Citation omitted]

State v. Daugherty, 22 Wn.App. at 445-46.

That the problem addressed above is a frequent and recurring one is demonstrated by State v. Campbell, 13 Wn.App. 722, 537 P.2d 1067 (1975) at 13 Wn.App. 730:

> Washington decisions are inconsistent in applying this [exigent circumstances] aspect of the plain view doctrine. In State v. Day, [7 Wn.App. 965, 503 P.2d 1098, (1972)] and State v. Glasper, [84 Wn.2d 17, 528 P.2d 937 (1974)] the rule was announced and exigent circumstances specifically found. In State v. Murray, [8 Wn.App. 944, 509 P.2d 1003 (1973)] the rule was announced in dicta. In several cases, the rule was not announced but the facts indicate the existence of exigent circumstances which would have permitted a warrantless seizure. See State v. Lesnick,

[84 Wn.2d 940, 530 P.2d 243 (1975)]; State v. Palmer, [5 Wn.App. 405, 487 P.2d 627 (1971)]; State v. Sinclair, 11 Wn.App. 523, 523 P.2d 1209 (1974); State v. Coburne, 10 Wn.App. 298, 518 P.2d 747 (1973). Other decisions do not announce the rule but uphold the warrantless seizure despite the absence of exigent circumstances. State v. Porter, 5 Wn.App. 460, 488 P.2d 773 (1971); State v. Dimmer, [7 Wn.App. 31, 497 P.2d 613 (1972)].

C. The exclusionary rule should be abandoned.

There are no doubt hundreds of cases which this Court could use as a vehicle for a reexamination of the "exclusionary rule" made applicable to the states by Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961). This case is not unique in that respect.

The many reasons calling for a reexamination were cogently expressed by Mr. Justice Rehnquist with the concurrence of The Chief Justice in California v. Minjares, ____ U.S. ____, 100 S.Ct. 9,

____ L.Ed.2d ____ (1979) (dissent from denial of stay of mandate). Petitioner will not unduly lengthen this Petition by expanding on those reasons. We will, however, offer our observation that the "exclusionary rule," more than any other, fosters popular disrespect for our criminal justice system and subverts the truth-finding process of criminal trials. Consequently, the continued viability of the "exclusionary rule" demands that there be compelling reasons in its favor. Petitioner submits there are not.

Conclusion

Petitioner requests that its Petition be granted.

Respectfully submitted

C. DANNY CLEM
Prosecuting Attorney

RONALD A. FRANZ
Deputy Prosecuting Attorney

[No. 46093. En Banc. September 11, 1980.]

THE STATE OF WASHINGTON, *Petitioner*, v. JAMES JOSEPH DAUGHERTY, *Respondent*.

[1] **Searches and Seizures — Warrantless Search — Validity — In General.** A warrantless search is not permissible unless it falls within one of the specific and carefully delineated exceptions to the warrant requirement of the Fourth Amendment.

[2] **Searches and Seizures — Objects in Plain View — In General.** Evidence may not be seized under the plain view doctrine unless there is a prior justification for police intrusion into an otherwise protected area, the incriminating evidence is inadvertently discovered, and the police officer knows immediately that he is viewing incriminating evidence.

[3] **Searches and Seizures — Standing To Challenge — Expectation of Privacy — Driveway.** An occupant of a house has a reasonable expectation of privacy in that portion of his driveway which is not exposed to view from a public street and which is not a means of conventional access to the house.

[4] **Appeal and Error — Findings of Fact — Review — Basic Rights.** An appellate court in its review of findings of fact will independently evaluate evidence which affects a fundamental constitutional right.

[5] **Searches and Seizures — Cautionary Search — Accomplice — Reasonableness.** A police officer may not enter a constitutionally protected area based upon a mere suspicion that an accomplice might be present.

APPENDIX "A"

[6] **Searches and Seizures — Objects in Plain View — Unjustified Intrusion — Inadvertent Discovery.** A police officer who observes incriminating evidence from a constitutionally protected area which he entered for the purpose of conducting an exploratory search for such evidence may not later claim that his discovery of the evidence was inadvertent.

UTTER, C.J., WRIGHT and HOROWITZ, JJ., and BRITT, J. Pro Tem., dissent by separate opinion; STAFFORD, J., did not participate in the disposition of this case.

Nature of Action: Prosecution for second degree burglary and second degree theft. While one police officer conversed with the defendant in the defendant's driveway, another officer walked to the rear of a truck in the driveway and observed a stolen safe through an open garage door.

Superior Court: The Superior Court for Kitsap County, No. C–3204, Jay W. Hamilton, J., refused to suppress the evidence and on July 14, 1977, entered a judgment of guilty of both charges.

Court of Appeals: The court *reversed* the judgment at 22 Wn. App. 442, holding that the intrusion into the garage was not justified by the observation of the safe in open view.

Supreme Court: Holding that the officer was not justified in walking behind the truck and that the seizure of the safe was not permissible under the plain view exception to the warrant requirement, the court *affirms* the decision of the Court of Appeals.

C. Danny Clem, Prosecuting Attorney, and *Ronald A. Franz, Deputy,* for petitioner.

William G. Knudsen of *Kitsap County Public Defender,* for respondent.

WILLIAMS, J.—Respondent James Joseph Daugherty was convicted in Kitsap County Superior Court on charges of second degree burglary and second degree theft. Division Two of the Court of Appeals reversed, holding that the trial

court improperly denied Daugherty's motion to suppress evidence seized by the police at his home. *State v. Daugherty*, 22 Wn. App. 442, 591 P.2d 801 (1979). The issue presented is whether, during a warrantless search of a driveway, the safe which was seen by one of the officers through an open garage door was improperly admitted into evidence. We hold its seizure improper and affirm the Court of Appeals.

At about 4:30 on the morning of May 12, 1977, an officer of the Poulsbo police department was on routine patrol when he encountered respondent parked with his pickup truck near the offices of the Dungeness Oyster Company. Respondent indicated to the officer that he had been drinking and that he intended to leave his truck there for the rest of the night and go to the nearby apartment of a friend. The officer then continued on his patrol.

Shortly before 8 o'clock that morning, the oyster company's employees arrived for work and discovered that the office had been broken into and the company safe was missing. The safe had apparently been removed by hand truck through a smashed-in door to a storage area. Respondent, a night driver for the company, had a key to an outside door which led to the same storage area.

The employees immediately called the Poulsbo police to the scene of the burglary. After conducting a preliminary investigation and learning of respondent's presence at the building several hours earlier, Officer Patterson, who was in charge, and three other officers drove out to respondent's home near Bremerton, several miles away. Patterson testified he took the three officers along with him partly as a training exercise, as they had been on the force for only about 2 weeks. None of the three were armed or in uniform, since they were not yet qualified under department regulations to carry a gun.

When they arrived at respondent's home, the officers observed respondent's pickup and an old former Army truck backed up against the open door to the garage. Officer Krebs immediately got out of the car and without direction

from Patterson walked down the right side of the driveway. At the same time, respondent came out from behind the trucks and met Officer Patterson at a point in front of the trucks near the entry to the driveway. Patterson told respondent he was investigating a burglary and asked if he could look around. Respondent said no and asked if he had a warrant. Patterson replied by telling respondent, "You know you are on probation."

While respondent was confronting Patterson, Officer Krebs proceeded to the back end of the two trucks near the opening of the garage. He testified this maneuver was necessary "in case the suspect would flee or if there was additional suspects." He added that from his experience on the Los Angeles Police Department he always took an alternate route from his fellow officers in the event a gun battle ensued or a suspect fled, so "you could be in a position that you would take action if he came your direction."

Krebs then noticed what appeared to be a safe partially protruding from a tarpaulin in the garage. Although he thought it was a safe, he did not know if it was the one taken in the burglary. Nevertheless, he called to Officer Patterson and told him to cuff respondent, which was done immediately. Patterson shouted to Krebs, "Is it here?" and Krebs answered, "Yes." Respondent was at that time placed under arrest. The officers removed the tarpaulin from the safe and satisfied themselves that it was the one taken from the Dungeness Oyster Company office. Patterson then searched respondent's house, but found nothing of an incriminating nature. Sergeant Cook arrived shortly thereafter, and he likewise searched respondent's house and found nothing.[1]

---

[1]Even assuming a valid arrest, both searches of respondent's residence were patently impermissible. *Chimel v. California*, 395 U.S. 752, 763, 23 L. Ed. 2d 685, 89 S. Ct. 2034 (1969) (a warrantless search incident to an arrest is limited to the arrestee's person and the area within his immediate control).

[1] Both the warrantless entry into respondent's garage and the seizure of the safe within fall under the fundamental rule announced in *Katz v. United States*, 389 U.S. 347, 357, 19 L. Ed. 2d 576, 88 S. Ct. 507 (1967):

> [S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.

(Footnotes omitted.) Since there was no warrant in the present case, the officers' conduct is proper only if it falls within one of the "jealously and carefully drawn" exceptions to the warrant requirement of the Fourth Amendment. *Jones v. United States*, 357 U.S. 493, 499, 2 L. Ed. 2d 1514, 78 S. Ct. 1253 (1958).

[2] The State argues that seizure of the safe was permissible under the "plain view" exception to the warrant requirement. The cornerstone of the plain view doctrine is *Coolidge v. New Hampshire*, 403 U.S. 443, 29 L. Ed. 2d 564, 91 S. Ct. 2022 (1971), in which the Supreme Court stated, at page 466:

> What the "plain view" cases have in common is that the police officer in each of them had a prior justification for an intrusion in the course of which he came inadvertently across a piece of evidence incriminating the accused. The doctrine serves to supplement the prior justification—whether it be a warrant for another object, hot pursuit, search incident to lawful arrest, or some other legitimate reason for being present unconnected with a search directed against the accused—and permits the warrantless seizure. Of course, the extension of the original justification is legitimate only where it is immediately apparent to the police that they have evidence before them; the "plain view" doctrine may not be used to extend a general exploratory search from one object to another until something incriminating at last emerges.

This rule has often been commented upon by the courts of this state. The rule as stated requires: (1) a prior justification for intrusion, (2) an inadvertent discovery of incriminating evidence, and (3) immediate knowledge by

the police that they have evidence before them. *State v. Lesnick*, 84 Wn.2d 940, 942, 530 P.2d 243 (1975); *State v. Murray*, 84 Wn.2d 527, 533–34, 527 P.2d 1303 (1974); *State v. Dimmer*, 7 Wn. App. 31, 33, 497 P.2d 613 (1972).

Applying the law to the facts of this case, it is clear that the officers' warrantless seizure of the safe from respondent's garage was unlawful unless the officers had a prior justification for the intrusion onto respondent's property and the discovery of the incriminating evidence was inadvertent.

[3] The first question is: Did the officer have a lawful right to be in the place from which he viewed the safe? The safe was first observed from Officer Krebs' vantage at the base of the driveway, just outside the garage. If the driveway itself is not an area in which respondent had a reasonable expectation of privacy, then respondent could not expect that the police would refrain from entry upon it. *Smith v. Maryland*, 442 U.S. 735, 740, 61 L. Ed. 2d 220, 99 S. Ct. 2577 (1979); *Rakas v. Illinois*, 439 U.S. 128, 143, 58 L. Ed. 2d 387, 99 S. Ct. 421 (1978). *And see Katz*, at 351–52.

The extent of expectation of privacy in a driveway is determined in any case under a test of reasonableness in light of such characteristics as the exposure of the driveway to the street and surrounding public areas, the use of the driveway for common access to the house, and the nature of the official incursion complained of. *United States v. Magana*, 512 F.2d 1169, 1171 (9th Cir. 1975).

Photographs of the driveway to respondent's house show that it is exposed to view from the street and is a means of conventional access to the attached house. The driveway is therefore not protected under the Fourth Amendment either from view by police officers or from an incursion by officers with a legitimate purpose walking across it to reach respondent at the door to his home. *Magana*, at 1170–71; *State v. Corbett*, 15 Ore. App. 470, 516 P.2d 487 (1973). On the other hand, as is similarly apparent from the photographs, respondent's entire driveway is not a pathway to

his house. When respondent parked his two vehicles at the rear of his driveway, in effect blocking and obscuring from view the remaining portion of the driveway and the interior of the garage, he had a subjective expectation that a small squad of police officers would not thread around and among the vehicles in an effort to meet him at his door. *Magana*, at 1170–71. Moreover, the expectation revealed by respondent's action is certainly an objectively legitimate one which "society is prepared to recognize as 'reasonable.'" *Katz*, at 361 (Harlan, J., concurring).

We need not determine whether the driveway became a protected area at the front of respondent's vehicles, or at the point where the officers first strayed substantially from a normal pathway directly to respondent. It is clear, however, that by the time Officer Krebs completed his "flanking action" around petitioner to the right of the truck, he had entered such an area. *Magana*, at 1171. At this point, if the intrusion was not lawful, neither was the subsequent seizure.

[4] The State contended at the suppression hearing that the intrusion was lawful because there were "exigent circumstances" requiring safety precautions against the chance a concealed accomplice might present a danger to the officers. The trial court agreed, concluding the officers' suspicion that an accomplice was involved was reasonable. While the findings of the trial court following a suppression hearing are of great significance to a reviewing court, the constitutional rights at issue require us to make an independent evaluation of the evidence. *State v. Agee*, 89 Wn.2d 416, 419, 573 P.2d 355 (1977); *State v. Byers*, 85 Wn.2d 783, 786, 539 P.2d 833 (1975); *State v. Smith*, 72 Wn.2d 479, 481, 434 P.2d 5 (1967).

[5] There is no question that police officers are entitled to take minimal precautions to insure their safety. Thus, they may "stop and frisk" a suspect when there are specific and articulable facts to support a suspicion that the person may be armed and dangerous. *Terry v. Ohio*, 392 U.S. 1, 21–22, 30, 20 L.Ed. 2d 889, 88 S. Ct. 1868 (1968). Moreover,

a limited search of premises subsequent to an arrest may be permissible to protect the safety of the officers and prevent interference with the arrest. *State v. Toliver*, 5 Wn. App. 321, 326, 487 P.2d 264 (1971); *United States v. Blalock*, 578 F.2d 245 (9th Cir. 1978).

As the basis for the officers' belief that an accomplice was present, the State points to evidence that: (1) the size and weight of the safe taken in the burglary was such that it was too large for one person to move, and (2) the door to the office where the safe was located was kicked in, a result that could not ordinarily be accomplished by one person. We do not believe that the record supports the State's conclusion.

The evidence revealed that the safe was 24 by 24 by 19 inches in size, weighed approximately 125 pounds, and was on casters. It further showed that it was moved from the office on a hand truck or dolly, which one person could easily have managed alone. The kicked–in door was hollow and of wood construction. There was one footprint on the door next to the handle. In addition, Sergeant Cook testified he saw the respondent at 4:30 a.m. in the parking lot of the Dungeness Oyster Company prior to the burglary, and he was alone at that time. There was *no evidence* that more than one person was involved.

It is thus apparent that the officers could not reasonably believe that more than one person was involved in the commission of the burglary. They may have had a vague hunch but no "specific and articulable facts" to support it. *Terry*, at 21.

Moreover, there was no reasonable basis for believing that if in fact there were an accomplice, he was present when the police arrived at respondent's residence. It had been nearly 6 hours since the commission of the crime, and respondent's house was located in or near Bremerton, several miles from the scene of the crime at Poulsbo.

[6] Even assuming for the sake of argument that the officers had reasonable grounds to believe an accomplice was involved, their stated purpose for going to respondent's

house and their conduct while there clearly demonstrate that they intruded onto the protected area of respondent's driveway not as a safety precaution but to search for evidence. If Patterson really believed there might be some danger to him or the other officers, it seems inconceivable that he would take unarmed and inexperienced officers as protection against the possibility of being endangered by a hidden accomplice. Further, it is difficult to imagine that Patterson would send unarmed men into an area where he had reason to believe a dangerous felon was hiding.

A more likely explanation for the officers' intrusion onto the property comes from Patterson's own testimony. He testified that he knew a safe had been taken in the burglary and he "believed" respondent had committed the crime, but he did not have enough evidence to make an arrest. It was therefore essential that he find evidence linking respondent's truck with the crime. In this regard, he testified as follows:

> Q. One of your intentions in terms of going to Mr. Daugherty's house was in terms of looking around the area, was it not? A. It was to look at his vehicle only. Q. To look at his vehicle? A. That is correct. Q. What in particular? A. The bed of the truck, particularly around the tailgate area. Q. And did you know what you were looking for? A. Yes. Q. What was that? A. Striations, marks, anything that indicated a heavy load that was either dragged on or dragged off; particularly black paint. Q. Did you believe before you arrived at Mr. Daugherty's house that you had probable cause to arrest him for the offense? A. Only if I—only if I found that evidence which I just stated.

The officers' conduct was consistent with that purpose. They entered the driveway over respondent's objection. Once on the property, Krebs immediately went to the area where he could examine the back of respondent's pickup for the evidence, which, once seized, provided an ostensible basis for the arrest and subsequent search for further evidence.

The officers' entry into the area behind respondent's truck was in fact a pretext to conduct an exploratory search of it and the garage in the hope that they would discover evidence of the burglary. *State v. Michaels*, 60 Wn.2d 638, 645, 374 P.2d 989 (1962). Discovery of any evidence in the course of such a search is not "inadvertent" as is required for the plain view doctrine to apply. *Coolidge v. New Hampshire*, 403 U.S. 443, 471, 29 L.Ed. 2d 564, 91 S. Ct. 2022 (1971). It follows that the inadvertence element of the exception was likewise absent in this search.

Since the State has failed to sustain its burden of showing the warrantless search fell within one of the exceptions to the warrant requirement of the Fourth Amendment, the search cannot be justified, and the motion to suppress the evidence should have been granted. *Arkansas v. Sanders*, 442 U.S. 753, 760, 61 L. Ed. 2d 235, 99 S. Ct. 2586 (1979). The decision of the Court of Appeals is accordingly affirmed.

ROSELLINI, BRACHTENBACH, DOLLIVER, and HICKS, JJ., concur.

UTTER, C.J. (dissenting)—I dissent. The majority's characterization of the issue is correct: if the officers' warrantless seizure of the safe in Daugherty's garage was unlawful absent a lawful prior search and intrusion by the officers notwithstanding their clear view of the safe from outside of the garage, the evidence should be suppressed. Conversely, if the officers' seizure followed such a lawful prior intrusion upon an area protected under the Fourth Amendment, during which the safe was inadvertently discovered, then the seizure itself is lawful, since the safe had obvious evidentiary value. Whether the intrusion was in fact lawful depended upon whether there were exigent circumstances justifying the officers' flanking action around Daugherty to the right of the truck. If the officers' testimony is accepted, their subsequent discovery of the safe was inadvertent, satisfying the requirement in *Coolidge v. New Hampshire*, 403

U.S. 443, 29 L. Ed. 2d 564, 91 S. Ct. 2022 (1971), that the discovery of the evidence must be inadvertent. *Coolidge*, at 471.

The trial court heard two officers' testimony of their concern for an accomplice and their practice intended to protect themselves from attack. It found the officers' testimony to be credible. This finding is entitled to special weight inasmuch as the trial court typically has the opportunity to hear and observe the officers who carried out the challenged search and seizure and is in the best position to determine their credibility, as compared to the reasonableness of their conduct. We should not disregard the trial court's finding unless the record compels a contrary view that the officers' testimony is not credible. This record does not compel such a contrary view although there is testimony, which the trial court heard, that could justify a contrary conclusion.

While an independent evaluation of the evidence may be justified by this court as asserted by the majority, it should not ignore the trial court's unique opportunity to determine whether the officers subjectively feared an accomplice was present and whether the belief was reasonable. Any other standard places us in the same indefensible position that existed prior to *Thorndike v. Hesperian Orchards, Inc.*, 54 Wn.2d 570, 343 P.2d 183 (1959).

Although an appellate court in a search and seizure case must conduct its own independent evaluation of the evidence, the trial court's findings on the reasonableness of the officers' actions are entitled to great weight on appeal, because the trial court had an opportunity to observe the officers and gauge their credibility.

A review of the record to determine what evidence exists to support the trial court's finding discloses evidence of Daugherty's presence at the oyster company, his recent employment by the company, and likelihood of his having a key to the outer door, though not the broken office door. This justified the officers' prompt investigation of his possible involvement. Reports of the size of the safe, and inferentially, its weight, as well as certain damage done to

the office door, could have fairly suggested to the officers the participation of an accomplice. While a different conclusion could be reached from that evidence, as the majority so concludes, the evidence does not compel a different conclusion, and the majority, in a case where it could not evaluate the candor of the witnesses, is simply substituting its view of the officers' subjective beliefs for that of the trial judge without the opportunity to hear their testimony and determine their credibility. This is not and should not be the function of an appellate court.

Upon arriving at Daugherty's house to pursue their investigation in these circumstances, the officers were entitled to take minimal precautions to assure their safety. In *State v. Toliver*, 5 Wn. App. 321, 487 P.2d 264 (1971), the court reasoned that the need of the police to assure their safety, recognized as justifying a "stop and frisk" in *Terry v. Ohio*, 392 U.S. 1, 20 L. Ed. 2d 889, 88 S. Ct. 1868 (1968), similarly may justify other intrusions otherwise barred by the Fourth Amendment. In that case the court held police officers' entrance into a house subsequent to an arrest was justified by reliable information that the arrested man's associates within the house were armed with guns and would use them to protect their friend, and the officers then hearing a commotion inside the house after the arrest. The police then entered after those inside had disregarded their warning to emerge.

The circumstances of *Toliver* are different from those existing here in that the officers in that case had more specific and reliable evidence of a potential threat to their safety. However, the intrusion sought to be justified in that case was also more extreme than that at issue here. Different degrees of intrusiveness require different degrees of justification. *Terry v. Ohio, supra* at 18 n.15.

A closer fact pattern is found in *United States v. Blalock*, 578 F.2d 245 (9th Cir. 1978). There, following arrest of the defendant in his shop for trafficking in narcotics, a police officer quickly checked behind the counter as part of an "eyeball search" of the front room of the shop for

accomplices. The court approved this limited cursory check, during which the heroin was discovered, as necessary for the safety of the arresting officers. *United States v. Blalock, supra* at 248.

While I would not hold the type of evidence confronting the officers in this case would justify the type of invasion executed by the officers in *Toliver*, I do believe the evidence taken in light of reasonable police practice justifies the type of limited cursory check approved in *Blalock*. I would hold that where an officer approaches a felony suspect and has good reason to believe the suspect is accompanied by an accomplice, the officer may permissibly perform a limited and cursory search of the immediate area from which the officer may be the target of gunfire. This holding would comport with the essential reasoning of the court in *Terry v. Ohio, supra*, and its progeny, in that the permissible search must be limited in scope and only for the purposes of securing the safety of the investigating officers.

Having found substantial evidence to support the trial court's finding that the officers' intrusion was permissibly made for their asserted reasons, I would find consistent with *Coolidge* that the safe was permissibly seized thereafter, and properly introduced into evidence at Daugherty's trial.

I would reverse the judgment of the Court of Appeals and reinstate the trial court's judgment convicting the defendant on charges of second degree burglary and second degree theft.

WRIGHT and HOROWITZ, JJ., and BRITT, J. Pro Tem., concur with UTTER, C.J.

[No. 3008–2. Division Two. January 17, 1979.]

THE STATE OF WASHINGTON, *Respondent*, v. JAMES JOSEPH DAUGHERTY, *Appellant*.

[1] **Searches and Seizures — Objects in Open View — Effect.** The viewing, from a position accessible to the public, of incriminating evidence placed in "open view" but, nevertheless, with some expectation of privacy within a constitutionally protected area, is not a "search" within the meaning of the Fourth Amendment. Such preintrusion "open view" observation by a police officer is distinguished from a post-intrusion "plain view" observation and, even though it provides probable cause to search, does not authorize the officer's intrusion into the constitutionally protected area in order to seize the evidence absent exigent circumstances.

[2] **Searches and Seizures — Warrantless Search — Exigent Circumstances — Convenience.** Inconvenience in obtaining a warrant does not justify a warrantless seizure of contraband.

Nature of Action: The defendant was charged with second-degree burglary and second-degree theft. He was arrested when officers observed a safe in the defendant's garage while talking to the defendant in the driveway. The safe was then seized.

APPENDIX "B"

Superior Court: The Superior Court for Kitsap County, No. C–3204, Jay W. Hamilton, J., on July 14, 1977, entered a judgment of guilty of both charges after refusing to suppress the evidence seized in the garage.

Court of Appeals: Holding that observation of the safe did not justify an intrusion into the constitutionally protected garage, the court *reverses* the conviction.

William G. Knudsen of *Kitsap County Public Defender*, for appellant.

C. Danny Clem, *Prosecuting Attorney*, and *Ronald A. Franz*, *Deputy*, for respondent.

PETRIE, J.—James J. Daugherty appeals his convictions of second–degree burglary and second–degree theft. His primary contention on appeal is that the trial court erred by refusing to suppress evidence seized by the police in his garage. We hold that the evidence was seized in violation of the fourth amendment to the United States Constitution. Accordingly, we must reverse the convictions.

The evidence presented at the suppression hearing establishes the following pattern. Shortly after 10 a.m. on May 12, 1977, four police officers drove to Mr. Daugherty's residence to investigate a burglary which had taken place the previous night. They had been told that at 4:30 a.m. Mr. Daugherty was seen in his pickup truck which at that time was in a parking stall backed up against the burglarized establishment and that a wheeled, black safe approximately 24 by 24 by 21 inches had been reportedly taken by the burglar. When they arrived at Daugherty's residence, they saw his pickup truck and an old model army truck parked side–by–side in a front yard driveway, backed up to the completely opened garage door. Mr. Daugherty, who was then in the garage, saw the police arriving, walked into the middle of his driveway between the two vehicles, and engaged in a brief conversation with Officer Patterson approximately 2 feet from the curb. Another officer, Krebs, walked around the army truck and, in his words, "took a

flanking action in case the suspect would flee or if there was [*sic*] additional suspects." He remained outside the garage; but looking through the open garage doorway, he observed "a black metal object with wheels on the bottom that resembled a safe . . . lying directly behind the pickup on the floor of the garage . . . covered partially" with a tarpaulin. The safe was not in an upright position and was situated in the garage in space which would ordinarily be occupied by a vehicle. Krebs shouted his find to Patterson, who promptly arrested Daugherty for burglary.

All the officers then entered the garage, seized the safe, and subsequently concluded that, indeed, it was the safe which had been taken in the previous night's burglary. At least one of the officers also entered the living quarters of the residence and seized property which had no connection with this burglary. Photographs indicate that the garage is attached to one side of the defendant's residence, the garage door faces the street, and the driveway forms a part of the unenclosed front yard.

[1] Several conclusions of law flow from this fact pattern. First, the defendant's driveway was clearly accessible to the public; at best, it was only a semi-private area. *United States v. Magana*, 512 F.2d 1169 (9th Cir. 1975). Technically, the officers' entrance onto the driveway might have constituted an abstract, theoretical trespass, but Daugherty's privacy was not invaded. *State v. Wright*, 74 Wn.2d 355, 444 P.2d 676 (1968). The driveway was not a constitutionally protected area. *United States v. Brown*, 487 F.2d 208 (4th Cir. 1973). *See also Wattenburg v. United States*, 388 F.2d 853 (9th Cir. 1968). Accordingly, when Officer Krebs observed the safe from outside the garage he had not yet intruded upon a constitutionally protected area. *Air Pollution Variance Bd. v. Western Alfalfa Corp.*, 416 U.S. 861, 40 L. Ed. 2d 607, 94 S. Ct. 2114 (1974). He saw the safe in "open view" and immediately recognized its significance. (For purposes of this opinion, we will assume that Krebs *inadvertently* observed the safe, although Daugherty contends the officers' actions and

words manifested a previously formed intent to search his house.)

Krebs' observation of the safe, coupled with his prior knowledge of the previous night's events, undoubtedly provided the officers with probable cause to arrest Daugherty and with probable cause to seek a search warrant. *State v. Manly*, 85 Wn.2d 120, 530 P.2d 306 (1975).

The real issue, therefore, reduces to a question of whether or not the police had the right to cross over Daugherty's threshold—into the garage—and seize the safe without the aid of a search warrant. The safe was partially covered and inside the garage—thus evidencing some expectation of privacy. Hence, seizure of the safe was constitutionally prohibited. *Taylor v. United States*, 286 U.S. 1, 76 L. Ed. 951, 52 S. Ct. 466 (1932). Nevertheless, the prosecution suggests justification can be found in *Coolidge v. New Hampshire*, 403 U.S. 443, 29 L. Ed. 2d 564, 91 S. Ct. 2022 (1971). *Coolidge* explains the so-called "plain view" exception to the general rule that warrantless searches and seizures are presumed to be constitutionally invalid. The so-called "plain view" exception presupposes a warrantless intrusion of a constitutionally protected area, but requires "prior justification for an *intrusion*." (Italics ours.) *Coolidge*, at 466.

In the case at bench, Officer Krebs' observation of the safe was not a "search" within the meaning of the Fourth Amendment; it was not truly a "plain view" observation. He merely observed from a position outside a protected area, that which was openly visible inside the protected area. *State v. Manly, supra; State v. Martin*, 73 Wn.2d 616, 440 P.2d 429 (1968). *State v. LaPierre*, 71 Wn.2d 385, 428 P.2d 579 (1967). His intrusion into a constitutionally protected area did not occur until he (and the other officers) entered the garage and seized the safe. More precisely described, the seizure followed a preintrusion "open view" observation, in contrast to a post-intrusion "plain view" observation. *See State v. O'Herron*, 153 N.J. Super. 570, 380 A.2d 728 (1977), *cert. denied*, 439 U.S. 1032 (1978). In

the absence of exigent circumstances, the officers could not seize that which was presented to them by the incontrovertible testimony of their senses, without first presenting that evidence of probable cause to a neutral and detached magistrate. The constitution requires that a magistrate, alone, is clothed with the power to authorize an intrusion into a constitutionally protected area and a seizure of evidence found therein. *McDonald v. United States*, 335 U.S. 451, 93 L. Ed. 153, 69 S. Ct. 191 (1948).

[2] We turn then briefly to the final question of whether exigent circumstances permitted a warrantless seizure. The prosecution makes no contention that exigent circumstances existed, and we find none. Indeed, the safe was not the type of evidence which could be readily destroyed or disposed of. Except for the police, the only person at the premises was the defendant, and he was arrested. There is simply no indication that the safe was threatened with removal or destruction. Inconvenience to the officers is insufficient to excuse the necessity to seek authorization from a magistrate. *Johnson v. United States*, 333 U.S. 10, 92 L. Ed. 436, 68 S. Ct. 367 (1948). The State did not sustain its burden of justifying a warrantless search.

The judgment and sentence must be reversed; the safe which was seized in violation of the constitution must be suppressed; and the defendant is entitled to a new trial at which the prosecution may present such other evidence as is not tainted by the unlawful seizure.

PEARSON, C.J., and REED, J., concur.

Reconsideration denied February 9, 1979.

Review granted by Supreme Court May 4, 1979.